Subject Index

	Page
Statement of amicus curiae	1
Reasons for granting the writ	2
I. This case affords an opportunity to articulate rules that will prevent the Freedom of Information Act from being vitiated by indiscriminate claims for exemptions	2
Introduction	2
1. Rules governing exemption claims and judicial review under the Freedom of Information Act should be but have not yet been articulated by this court	5
2. Freedom of information is an increasingly vital check on arbitrary government action	7
3. The formulation of guidelines will facilitate judicial review	8
II. This case affords an opportunity to harmonize the secrecy exemption under the Freedom of Information Act with this court's rules on executive privilege	8
Conclusion	14

Table of Authorities Cited

Cases	Pages
American Mail Line Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969)	6
Ass'n of Data Processing Service Organizations, Inc. v. Camp, 38 L.W. 4193 (1970)	7
Conway v. Rimmer (1968), All.E.R. 874-H.L.	11
Crosby v. Pacific S.S. Lines, 133 P.2d 470 (9th Cir.), cert. denied, 319 U.S. 752 (1943)	11
Duncan v. Campbell, Laird & Co., Ltd. (1942), 1 All.E.R. 587-H.L.	11
General Services Administration v. Benson, 415 F.2d (9th Cir. 1969)	6, 13

Pages

Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963) 9

Carl Zeiss Stiftung v. V.E.B., Carl Zeiss, Jena, 40 F.R.D. 318 (D.C. D.C. 1966), affirmed per curiam, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967)..... 9

United States v. Burr, 25 Fed.Cas. 30 (No. 14692d), 187 (No. 14694) (C.C. Va. 1807)..... 5, 9

United States v. Reynolds, 345 U.S. 1 (1953)....4, 6, 8, 9, 11, 13

Statutes

Freedom of Information Act of June 11, 1946 (Ch. 324, Sec. 3, 60 Stat. 238)..... 10

5 U.S.C. 552(a)(3) 4, 6

5 U.S.C. 552(b)(1) 4, 6

Orders

Executive Order 10501 6

Executive Order 10501, Section 1(a) 3

Congressional Reports

House Comm. on Gov't Operations, Freedom of Information Act (Compilation and Analysis of Departmental Regulations), p. 46, 90th Cong., 2d Sess. (1968)..... 12

S.Rep. No. 813, 89th Cong., 1st Sess. (1965)..... 4, 6

S.Rep. No. 813, 89th Cong., 1st Sess. 5 (1965)..... 10

Senate Jud. Comm., Subcomm. on Admin. Pract. & Proc., Freedom of Information Act (Ten Months Review), p. 3, 90th Cong., 2d Sess. (1968)..... 4

32 C.F.R. 286.4(c) 12

Rules

Rules of the Supreme Court, Rule 42 1

Texts

Pages

Berger, Executive Privilege v. Congressional Inquiry, 12 U.C.L.A. L. Rev. 1044, 1107-1110 (1965) 5, 9

Bouscaren, International Migrations Since 1945, pp. 47-66 (1963) 13

Brandeis, Other People's Money, p. 62 (1933) 3

Coles & Weinberg, United States Army in World War II, Civil Affairs: Soldiers Become Governors, Department of the Army (1964) pp. 582, 648 12

Davis, Discretionary Justice 226, 111-116 (1969) 2, 3

Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761 (1967) 4

Dept. of State Public 6199, Foreign Relations of the United States, The Conferences at Malta and Yalta 1945, pp. 985-987 (1955) 12

The Freedom of Information Act: A Critical Review, 38 Geo. Wash. L. Rev. 150 (1969) 4, 6

Freedom of Information: The Statute and the Regulations, 56 Georgetown L.J. 18 (1967) 4

Hardin, Executive Privilege in the Federal Courts, 71 Yale L.J. 879, 894-895 (1962) 5, 7, 9, 13

L. Jaffe, Judicial Control of Administrative Action 363-364 (1965) 9

The Freedom of Information Bill, 40 Notre Dame Law. 417 (1965) 4

Letter from James Madison to W. T. Barry, Aug. 4, 1822, in The Complete Madison 337 (Padover ed. 1953) 8

Documents on the Expulsion of the German Population from Eastern and Central Europe (Schneider edition, 1960-61) 13

The Information Act: Judicial Enforcement of the Records Provision, 54 Va. L. Rev. 466 (1968) 4

The 1966 Freedom of Information Act—Early Judicial Interpretations, 44 Wash. L. Rev. 641 (1968-69) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

JULIUS EPSTEIN,
Petitioner,

vs.

STANLEY RESOR, Secretary of the Army; DEPARTMENT OF THE ARMY; DEPARTMENT OF DEFENSE,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Amicus Curiae urges that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on February 6, 1970.

STATEMENT OF AMICUS CURIAE

This brief is submitted with consent of the parties as provided under Rule 42 of the Rules of this

Court. Letters of consent from each party's counsel are on file with the Clerk of this Court.

The American Civil Liberties Union of Northern California is a non-partisan, non-profit organization dedicated solely to the protection and preservation of the individual liberties guaranteed by the Bill of Rights. We have traditionally been especially concerned with the free exercise of opinion and argument upon which the First Amendment and our form of representative democracy are based.

The exercise of opinion and argument so necessary to a free and open society means little if the relevant facts of government are hidden from the people. In recognition of this, Congress enacted the Freedom of Information Act, effective Independence Day, 1967, so that public access to the facts of government could be guaranteed. In that same spirit, because access to information is critical to an enlightened electorate and essential to the exposure of truth in the marketplace of ideas, we submit this brief in the conviction that it will aid this Court in determining the important issues here presented.

REASONS FOR GRANTING THE WRIT

I. THIS CASE AFFORDS AN OPPORTUNITY TO ARTICULATE RULES THAT WILL PREVENT THE FREEDOM OF INFORMATION ACT FROM BEING VITIATED BY INDISCRIMINATE CLAIMS FOR EXEMPTIONS.

INTRODUCTION

"Openness is a natural enemy of arbitrariness, a natural ally in the fight against injustice." Davis,

Discretionary Justice 226, 111-116 (1969). "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Brandeis, Other Peoples Money 62 (1933).

The old Army file in this case, however, has not seen the light of day for over 23 years. Mr. Epstein began requesting it for his historical research in 1954 (R. 185-199; 31-45) and formally requested it several times again in 1967 and 1968. (R. 1-2, 29, 35, 42, 196, 198.) The Army replied that the entire file is top secret and that declassification review will take "considerable time." (R. 26, 40, 197.)[1]

The courts below, however, excused the Army from any "foot-dragging" and, without even looking at the file, concluded that the Army's action was not arbitrary or capricious and hence should be upheld summarily.

The summary judgment for the Army, affirmed on appeal, is wrong: It vitiates the purpose of the Free-

[1]After the trial, the Army released four documents from the file (reproduced as Appendix A in the brief of amicus curiae in the 9th Circuit). These documents are: a request for interpreters; two papers originally classified "secret" only; and one paper originally unclassified. These papers, hidden from view for over 23 years, reflect the Army's judgment, accepted without question by the courts below, of what meets the President's test that "Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or technological developments vital to the national defense." Exec. O. 10501 §1(a)(R.68.) In the Court of Appeals, amicus curiae set out the numerous failures of the Army to comply not only with the Executive Order but also with its own regulations governing classification and declassification of documents. (AC brief pp. 24-49.)

dom of Information Act that "disclosure be the general rule not the exception."[2] It pays lip service only to the de novo test of judicial review required by the statute, 5 U.S.C. §552(a)(3), and substitutes a virtually unenforceable "arbitrary and capricious" test for reviewing claims to the secrecy exemption, §552 (b)(1); this test is not found in the statute and is precluded by it. The judgment defeats the statutory purpose of expeditious disclosure, §552(a)(3), and encourages long delays whenever a department official thinks he can show that "questions bearing on that need [for secrecy] persist and require resolution by the executive." (Slip. Opn. p.5.) It encourages classification and retention of documents as "top secret" in direct disregard of the strict tests of Executive Order 10501 (see f.n. 1, supra). It breathes life in the notion that judges cannot review claims of secrecy because they are "essentially political" (Slip. Opn., p.4) even though this notion has been squarely rejected by this Court, *United States v. Reynolds*, 345 U.S. 1 (1953) and was rejected early in our country's

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[2]Sen. Jud. Comm., Subcomm. on Admin. Pract. & Proc., *The Freedom of Information Act (Ten Months Review)*, p. 3, 90th Cong., 2d Sess. (1968); S.Rep. No. 813, 89th Cong., 1st Sess. (1965); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act ii (1947) quoting President Johnson's statement in signing the bill that "the United States is an open society in which the people's right to know is cherished and guarded." See Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi.L.Rev. 761 (1967); Note, *The Freedom of Information Bill*, 40 Notre Dame Law. 417 (1965) (extensive discussion of bill and related earlier proposals); Note, *Freedom of Information: The Statute and the Regulations*, 56 Georgetown L.J. 18 (1967); Note, *The Information Act: Judicial Enforcement of the Records Provision*, 54 Va.L. Rev. 466 (1968); Note, *The Freedom of Information Act: A Critical Review*, 38 Geo. Wash. L.Rev. 150 (1969).

history by Chief Justice Marshall at the trial of Aaron Burr. *United States v. Burr,* 25 Fed.Cas. 30, 37-38 (No. 14692d); 187, 191-192 (No. 14694) (C.C. Va. 1807). See Berger, *Executive Privilege v. Congressional Inquiry,* 12 U.C.L.A.L.Rev. 1044, 1107-1110 (1965); Hardin, *Executive Privilege in the Federal Courts,* 71 Yale L.J. 879, 899-900 (1962).

Finally, the judgment makes no sense. How can judges decide important questions without having the crucial facts before them? There was no compelling national interest to be served by precluding not only disclosure in court but also review in camera of the old file. A citizen's right to know, a historian's scholarly research, the open disclosure policy of Congress, and the interest, vital to our judicial process, of having an adequate record to review were all sacrificed for a false sense of security.

1. Rules governing exemption claims and judicial review under the Freedom of Information Act should be but have not yet been articulated by this Court.

The judgment below, unless reversed, will encourage indiscriminate claims for exemption and defeat the purpose of the Freedom of Information Act. This Court can prevent such a result by granting the writ, reversing the judgment, and articulating rules governing exemption claims and judicial review under the Freedom of Information Act.

This Court has not articulated such rules. The absence of rules encourages conflict, confusion, and frustration of the statutory purpose of open disclosure. See, *e.g.,* two recent reviews of the lower court

cases which reveal that the agencies and the lower courts have acted too often to uphold secrecy and deny disclosure. Note, *The Freedom of Information Act: A Critical Review,* 38 Geo. Wash.L.Rev. 150 (1969); *The 1966 Freedom of Information Act—Early Judicial Interpretations,* 44 Wash.L.Rev. 641 (1968-69). The exceptions are few and far between. *American Mail Line Ltd. v. Gulick,* 411 F.2d 696 (D.C. Cir. 1969); *General Services Administration v. Benson,* 415 F.2d (9th Cir. 1969) (in camera review).

Three pertinent rules could be articulated, for example, for cases such as this one:

(a) A federal agency that claims that its information must be kept secret in the interest of the national defense or foreign policy must satisfy a federal district court on de novo review that such secrecy is specifically required by Executive Order; the court's responsibility is not limited to determining whether the agency action was "arbitrary" or "capricious". 5 U.S.C. §§552(a)(3), 552(b)(1); S.Rep. No. 813, 89th Cong., 1st Sess. (1965); Exec. O. 10501; *United States v. Reynolds,* 345 U.S. 1 (1953); *American Mail Line v. Gulick,* 411 F.2d 696 (D.C. Cir. 1969).

(b) The Court reviewing the claim for exemption must have an opportunity to examine the document in camera unless a compelling national interest would be imperiled by even such limited disclosure. *United States v. Reynolds,* 345 U.S. 1 (1953); *General Services Administration v. Benson,* 415 F.2d 878 (9th Cir. 1969). If we are concerned, as we must be, and as the court was in the *Reynolds* case, and as Congress was

in passing the Freedom of Information Act, "that executive caprice might be substituted for honest judgment, the only way for the court to probe the claim of privilege is to take a look at the information in question. . . . In the last analysis, if the court does not examine the information to weigh need for disclosure against the public interest in secrecy, the executive determines the question of privilege." Hardin, *Executive Privilege in the Federal Courts,* 71 Yale L.J. 879, 894-895 (1962).

(c) A claim to the secrecy exemption, like a claim of executive privilege, is not to be lightly invoked. There must be a formal claim for it, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. *United States v. Reynolds,* 345 U.S. 1, 7-8 (1953); see point II, *infra.*

The foregoing is simply a suggested formulation. The overriding point is that it is time for this Court to advance the statutory purpose of disclosure by reversing the unjust result in this case and providing guidance to the lower courts and to the agencies so as to clarify this important but confused area of the law.

2. Freedom of information is an increasingly vital check on arbitrary government action.

Without adequate information, arbitrary government action cannot be effectively reviewed. Effective review is aided by the trend "toward enlargement of the class of people who may protest administrative action", *Ass'n of Data Processing Service Organizations, Inc. v. Camp,* 38 L.W. 4193 (1970), but it will

be frustrated if the agencies can effectively deny information to those with standing to protest. "A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own governors, must arm themselves with the power which knowledge gives." Ltr. from James Madison to W. T. Barry, Aug. 4, 1822, in The Complete Madison 337 (Padover ed. 1953).

3. The formulation of guidelines will facilitate judicial review.

It is reasonable to anticipate that agency records and disclosure actions will improve if the agencies have a clear responsibility not to make indiscriminate claims to exemptions under the Freedom of Information Act and to justify the claims they do make before a federal court if they are challenged. Improved agency records and action will reduce the need for judicial review and will facilitate the judicial review that remains necessary.

II. THIS CASE AFFORDS AN OPPORTUNITY TO HARMONIZE THE SECRECY EXEMPTION UNDER THE FREEDOM OF INFORMATION ACT WITH THIS COURT'S RULES ON EXECUTIVE PRIVILEGE

In *United States v. Reynolds*, 345 U.S. 1 (1953), a litigant sought reports concerning experimental electronic equipment on a military airplane that crashed. The government's claim of secrecy under the executive

privilege doctrine was made by a cabinet level officer after a personal review of the file.[3]

The Court in *Reynolds* found that the information was of immediate and current value to the military; that under the facts there involved this could be determined without seeing the report itself; that its disclosure might compromise the nation's defense; and that alternative sources of information were available, namely the surviving crew members, which the government offered to make available. Given that context and the alternative sources of information, in camera review was deemed unnecessary.[4]

The instant case affords an opportunity to harmonize the secrecy exemption under the Freedom of Information Act with the rulings of the *Reynolds* case on executive privilege. These rulings should be applied as minimum standards for claiming the secrecy exemption and reviewing such claims under the Freedom of Information Act.

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[3]"The privilege belongs to the government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." 353 U.S. at 7-8. See also *Machin v. Zuckert*, 316 F.2d 336, 338 (D.C. Cir.) (formal claim of privilege by Secretary of the Air Force), *cert. denied*, 375 U.S. 896 (1963); *Carl Zeiss Stiftung v. V.E.B., Carl Zeiss, Jena*, 40 F.R.D. 318, 323 (D.C.D.C. 1966), *affirmed per curiam* 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967) (affidavit of Attorney General in his capacity as head of the Department of Justice).

[4]See also *United States v. Burr*, 25 Fed. Cas. 187, 191-192 (No. 14694) (C.C. Va. 1807) (Marshall, C.J.); Berger, *Executive Privilege* v. *Congressional Inquiry*, 12 U.C.L.A.L.Rev. 1044, 1107-1110 (1965); Hardin, *Executive Privilege in the Federal Courts*, 71 Yale L.J. 879, 899-900 (1962); L. Jaffe, *Judicial Control of Administrative Action* 363-364 (1965).

Prior to the Freedom of Information Act, disclosure was not required "of information held confidential for good cause found" or matters relating to "any function of the United States requiring secrecy in the public interest," and there was no provision for judicial review of an agency's decision that there was "good cause" or a need for secrecy. Act of June 11, 1946, ch. 324, Section 3, 60 Stat. 238. The Freedom of Information Act was designed to reverse the thrust of the earlier statute which had been construed to authorize widespread withholding of agency records. S.Rep. No. 813, 89th Cong. 1st Sess. 5 (1965). The "secrecy" exemption in particular was changed to "delimit more narrowly the exception and to give it a more precise definition." S.Rep., *supra* at 8. The Act gave standing to ordinary citizens to obtain judicial review of agency nondisclosure no less than the review available to litigants under the *Reynolds* case.

Applying the standards of the *Reynolds* case will fulfill these statutory purposes, clarify the rules for claiming the secrecy exemption, and facilitate judicial review of such claims.

The foregoing analysis can be tested by applying the *Reynolds* standards to the instant case.

In this case the secrecy privilege was claimed by the Adjutant General of the Army. Although he is charged with the authority to release information from the archives (R. 23), he is not the head of the Department of the Army or the Department of Defense. His affidavit does not reflect the personal action of the head of the department affected that is

necessary to obtain the privilege of the secrecy exemption.

On the merits, the same kind of circumstantial review made in *Reynolds,* without examining the documents themselves, perhaps is possible in this case but it leads to the opposite result: It is implausible, for example, that the British will go to war with us if the Operation Keelhaul file is disclosed to a reputable historian; conversely our government is totally dependent upon the British for secrecy because they have the original of the file. If our relations with other nations might be affected, we are at the mercy of Her Majesty's government. It is possible, perhaps, that some nation or nations would be upset to learn what we and others did 20-odd years ago, but not overwhelmingly likely. The Army can scarcely be said to have carried its burden of showing that it is essential that this information be "kept secret in the interest of the national defense or foreign policy." It is ironic indeed that the Freedom of Information Act, which became effective on a day celebrating nearly 200 years of independence from the British, has been interpreted below to uphold the United States Army's notion that British consent to the release of a 23-year old file is required before Congress' purpose of making United States records public can be served.[5]

[5]It bears noting that the Army made no showing that a claim of privilege by a British official would be sustained by a court. See *Crosby v. Pacific S.S. Lines,* 133 P.2d 470, 475 (9th Cir.), *cert. denied,* 319 U.S. 752 (1943) (claim of British official to privilege denied). See also *Conway v. Rimmer,* (1968) All.E.R. 874-H.L., which established the principle of substantial judicial review of claims of executive privilege and effectively overruled *Duncan v. Campbell, Laird & Co., Ltd.* (1942), 1 All.E.R. 587-H.L.

It is remotely possible that the Army could show, by an in camera disclosure to the trial court, that a few documents should be kept secret. Showing the file to the trial judge and having him react to the assertion that our national defense or foreign policy will be compromised will not be a significant breach in the secrecy wall. It is admitted that the file exists, and that the British have the original. The file has only historical value because it has been moved to the National Archives. A careful examination cannot possibly harm the nation's national defense or foreign policy interests and that kind of examination is precisely what Congress wanted when it passed the Freedom of Information Act.[6]

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[6]Presumably, the Army's principal expertise on the implications of disclosing the file would be in the national defense area rather than the foreign policy area. However, the file is very old and the national defense implications, if any, of releasing it seem remote. Presumably, also, the Army's reluctance to release the file does not arise out of any desire to hide error or inefficiency of the Army or an allied component of Allied Force Headquarters (AFHQ) such as the British, for to do so would directly contradict Department of Defense policy that a claim that information is exempt from disclosure under the Freedom of Information Act "in no event" shall be "influenced by the possibility that its release might suggest administrative error or inefficiency or might embarrass a component or an official of that component." 32 C.F.R. Section 286.4(e), reproduced in House Comm. on Gov't Operations, *Freedom of Information Act (Compilation and Analysis of Departmental Regulations)*, p. 46, 90th Cong., 2d Sess. (1968). One would think also that the Army might be glad to release the file to clear away any suggestion that it might have used force or cooperated in the use of force in the repatriation of persons to the Soviet Union. Repatriation by force was not provided for in the Yalta agreements, and official Army history makes clear that Allied policy was to protect "displaced persons from forcible repatriation." Coles & Weinberg, *United States Army in World War II, Civil Affairs: Soldiers Become Governors*, Department of the Army (1964), pp. 582, 648; Dept. of State Public. 6199, *Foreign Relations of the United States, The Conferences at Malta and Yalta 1945*, pp. 985-987

Under the *Reynolds* case and the statute, the courts below failed to discharge their statutory and judicial responsibilities to determine the question of secrecy. If the courts could not reject the Army's claim entirely, they could, at the very least, have required the Army to produce the file for review in camera and independent judicial judgment. *United States v. Reynolds, supra; General Services Administration v. Benson,* 415 F.2d 878 (9th Cir. 1969); *Hardin, Executive Privilege in the Federal Courts,* 71 Yale L.J. 879, 894-895 (1962).

(1955). It would seem unlikely also that the Army desires to protect Soviet Communists from disclosure about their use of force. The Army surely is opposed to Communist aggression. Moreover, a decision to protect Soviet Communists would not seem to be one of national defense. Besides, the story of the Communists' use of force has already been documented in some detail. See, *e.g.,* the four-volume collection, translated from the German, entitled *Documents on the Expulsion of the German Population from Eastern and Central Europe* (Schneider ed., 1960-61); Bouscaren, *International Migrations Since 1945,* pp. 47-66 (1963).

CONCLUSION

A rational determination of the issues in this case is essential to ensure that citizens will have the access to information that the Freedom of Information Act was meant to give and to prevent the Act from being vitiated by indiscriminate claims to secrecy and administrative delay. The petition for a writ of certiorari should be granted and the judgment of the Court of Appeals reversed.

Dated, May 6, 1970.

Respectfully submitted,

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